

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

ROBERT R. STEWART,

Debtor.

CASE NUMBER 04-41449

LAUREN M. S. BOLFANGO,

Plaintiff,

vs.

ROBERT R. STEWART,

Defendant.

ADVERSARY NUMBER 04-4135

M E M O R A N D U M O P I N I O N

Plaintiff Lauren M. S. Bolfango ("Plaintiff" or "Bolfango"), *pro se*,¹ filed this adversary proceeding on July 21, 2004, alleging that Debtor/Defendant Robert R. Stewart ("Defendant" or "Stewart") owed Plaintiff a debt that was not dischargeable, pursuant to § 523(a)(2) of the Bankruptcy Code. Plaintiff asserts that the debt arose out of the sale in 1995 by Defendant to Plaintiff of a 1981 Mercedes-Benz 380SL and that Defendant made fraudulent statements in order to induce her to purchase the vehicle. Plaintiff further alleges that she filed a lawsuit

¹Plaintiff is representing herself *pro se*, but she is a licensed attorney in California.

against Stewart in the Superior Court of California in and for the County of San Mateo (the "California Court") entitled *Lauren M. S. Bolfango v. Robert Stewart*, Case No. C-170751 (the "California Case"). Plaintiff's Complaint in the California Case was a form complaint and alleged that her damages were based on "Intentional or Negligent Misrepresentation" as well as "fraud." See Pl.'s Reply Br. in Supp. of Summ. J., Ex. 1. Plaintiff and Defendant both agree that a judgment was entered by the California Court on May 26, 2000 in favor of Plaintiff in the amount of Nineteen Thousand Eight Hundred Forty-Eight Dollars (\$19,848.00) with interest from judgment until paid at the rate of ten percent (10%) per annum (the "Judgment"). A copy of the Judgment is attached to Plaintiff's Complaint in this adversary proceeding and incorporated therein. The Judgment was obtained after a trial at which Defendant did not appear or defend. Stewart appealed the Judgment, but the appeal was dismissed on December 5, 2000 for failure to diligently prosecute.

There is no dispute that the Judgment is final and evidences a debt owed to Plaintiff by Defendant. The only issue is whether the debt is excepted from discharge by § 523(a)(2) of the Bankruptcy Code.

F A C T S

On January 24, 2005, Plaintiff filed Plaintiffs' [sic] Notice of Motion and Motion for Summary Judgment; Supporting Memo-

randum of Points and Authorities and Declaration of Lauren M. S. Bolfango and a Separate Statement of Undisputed Material Facts in Support of Lauren M. S. Bolfango's Motion for Summary Judgment. Defendant filed Defendant's Response in Opposition to Plaintiff's Motion for Summary Judgment on February 10, 2005. On February 22, 2005, Plaintiff filed Plaintiffs' [sic] Reply Brief in Support of Summary Judgment, which was followed two days later by Defendant's filing of Defendant's Counter Reply. On March 7, 2005, Plaintiff filed Plaintiffs' [sic] Objection to and Reply to "Counter Reply" Support of Summary Judgment [sic]. This Court notes that only the first two pleadings were appropriately filed. Plaintiff objects to Defendant's Counter Reply on the basis that "the local rules do not provide for such a pleading." However, Plaintiff's Reply also should not be permitted because Local Bankruptcy Rule 9013-1(c) provides that a Reply "may" be filed within seven (7) days of a Response. Plaintiff's Reply was not timely. There is nothing in either of the subsequent pleadings filed by the parties that isn't either repetitive or that could (and, hence, should) have been included in the permitted filings.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

S T A N D A R D O F R E V I E W

The procedure for granting summary judgment is found in FED. R. CIV. P. 56(c), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part that,

[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. BANKR. P. 7056(c). Summary judgment is proper if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Tenn. Dep't of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

In a motion for summary judgment, the movant bears the initial burden to establish an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 322; *Gibson v. Gibson*

(*In re Gibson*), 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998). The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). However, in responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 257). That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *Street*, 886 F.2d at 1479.

D I S C U S S I O N

The Judgment states, in pertinent part:

IT IS ADJUDGED, ORDERED, AND DECREED that plain-tiff, Lauren M. S. Bolfango, have and recover from defendant, Robert Stewart, the sum of \$19,848.00 together with interest thereon at the legal rate of ten (10) percent (%) per annum from the date of judgment until paid, costs and disbursements waived by plaintiff.

Despite the fact that Plaintiff had requested punitive damages and attorney's fees in the California Case, such amounts were not

awarded by the California Court.

Plaintiff argues that summary judgment is appropriate because Defendant is collaterally estopped from relitigating the issue of fraud since the California Court issued the Judgment. Plaintiff asserts that the Judgment is not dischargeable under § 523(a)(2) because it is based on "fraud."

Section 523(a) provides as follows:

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt--

* * *

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by--

(A) false pretenses, a false representation, or actual fraud,
. . . .

Thus, in order for the Judgment to be nondischargeable, it must be based on "false pretenses, a false representation, or actual fraud." Plaintiff argues that the California Court based its Judgment on a finding of fraud, and, therefore, there is nothing for this Court to do except give full faith and credit to that Judgment and declare the debt based on the Judgment to be an exception to discharge. Plaintiff's position is thus stated: "The court judgment after trial determining Defendant's fraud is on file herein and it is clear on its face that the issue of Defendant's fraud was necessarily decided." See Pl.'s Mot. for Summ. J., at 7.

The problem is that it is not "clear on its face" that the Judgment was based on any finding of fraud. The California Court made no findings of fact and made no statement in the Judgment that shows the Judgment was based on fraud. Plaintiff's Complaint in the California Case alleges negligent misrepresentation as well as fraud. It is not at all clear that the California Court, in finding for Plaintiff, found that Defendant committed fraud. This is especially true in light of the fact that the California Court declined to award Plaintiff punitive damages or attorney's fees.

In order to be an exception to discharge, a creditor must establish five elements by a preponderance of evidence:

(1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct.

Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000) (citations omitted). Although Plaintiff appears to have alleged facts in the California Case that may establish the elements of nondischargeability of the debt, there is not sufficient evidence before this Court to determine that the issue of fraud was actually litigated. The Complaint in the California Case alleges negligent misrepresentation as well as fraud and the Judgment is silent as to the basis for the award of

damages.

C O N C L U S I O N

Accordingly, this Court finds that Plaintiff has failed to establish facts sufficient to find that the issue of fraud was actually litigated in the California Court and that fraud was the basis upon which the Judgment was entered. As a consequence, Plaintiff's Motion for Summary Judgment is denied.

An appropriate order shall enter.

**HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE**

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

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O R D E R

For the reasons set forth in this Court's Memorandum Opinion entered this date, Plaintiff's Motion for Summary Judgment is denied.

IT IS SO ORDERED.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Opinion and Order were placed in the United States Mail this _____ day of April, 2005, addressed to:

LAUREN M. S. BOLFANGO, ESQ., 235 Montgomery Street, Suite 725, San Francisco, CA 94104.

ROBERT R. STEWART, 762 Gaylord Street, Masury, OH 44438.

ANDREW W. SUHAR, ESQ., 1101 Metropolitan Tower, P. O. Box 1497, Youngstown, OH 44501.

MICHAEL D. BUZULENCIA, ESQ., 150 East Market Street, Suite 300, Warren, OH 44481.

SAUL EISEN, United States Trustee, BP America Building, 200 Public Square, 20th Floor, Suite 3300, Cleveland, OH 44114.

JOANNA M. ARMSTRONG